

Thirunesan (Migration) [2020] AATA 2544 (11 May 2020)

- 1.
- 2.
- 3.

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Ponnampalam Thirunesan
VISA APPLICANTS:	Mrs Tharany Thirunesan Ms Adsalini Thirunesan
CASE NUMBER:	1801431
DIBP REFERENCE(S):	2013018407 oSF2013018407
MEMBER:	Stephen Witts
DATE:	11 May 2020
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicants Partner (Provisional) (Class UF) visas.

Statement made on 11 May 2020 at 11:51am

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Spouse (Provisional)) – bogus document or false or misleading information – sponsor’s non-genuine police clearance from home country – sponsor’s genuine belief that document obtained by third parties was real – waiver of criterion – compassionate or compelling circumstances – prolonged separation of family – sponsor’s mental health and care – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), s 65
Migration Regulations 1994 (Cth), Schedule 2, cl 309.225, Schedule 4, PIC 4020

CASES

Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Kaur v MIBP [2017] FCAFC 184
Plaintiff M64/2015 v MIBP [2015] HCA 50
Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Immigration on 16 November 2017 to refuse to grant the applicants Partner (Provisional) (Class UF) visas under s.65 of the *Migration Act 1958* (the Act).
5. The applicants applied for the visas on 18 September 2013. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl.309.225 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because a delegate was satisfied that the applicant provided false or misleading information, and bogus documentation to the department, in relation to this Visa application.
6. It is noted by the Tribunal that the hearing was undertaken by phone due to isolation procedures undertaken as a result of the coronavirus pandemic. It is further noted by the Tribunal that on 20 March 2020 the Tribunal wrote to the sponsor informing the sponsor that the Tribunal had considered the material before it but was unable to make a favourable decision on this information alone. The Tribunal informed the sponsor that as a result of the COVID-19 pandemic the Tribunal was not holding face-to-face hearings from Monday, 23 March 2020. In this letter it was noted by the Tribunal that the impact of this had been considered and a decision had been made that a telephone hearing is suitable in this case. On that basis the sponsor was informed that a hearing would proceed by telephone on 7 May at 9:30 AM.
7. The hearing was therefore held during the COVID-19 pandemic. The Tribunal determined it was reasonable to hold a hearing by telephone, having regard to the nature of this matter and the individual circumstances of the applicant. The Tribunal also had regard to its objective of providing a mechanism of review that is fair, just, economical and quick. It also considered the consequences of further delay if the hearing was not to be conducted by telephone. The applicant did not raise any concerns as to conducting a review hearing by phone. The Tribunal is satisfied that the applicant was given a fair opportunity to give evidence and present arguments.
8. On that basis the applicant provided oral evidence by telephone from Australia and the applicant provided oral evidence by telephone from Sri Lanka.
9. The Tribunal hearing was conducted with the assistance of an interpreter in the Tamil (Sri Lankan) and English languages.
10. The review applicant was represented in relation to the review by his registered migration agent.
11. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

12. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.309.225 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical

officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and

- the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
- the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
- neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

13. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

14. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
15. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
16. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
17. According to the delegate's decision record, provided to the Tribunal by the applicant, dated 16 November 2017, the applicant, Mrs Thirunesan, is a Sri Lankan citizen who applied for a Partner (Provisional) (Class UF) subclass 309 and a Partner (Migrant) (Class BC) (subclass 100) visa on 18 September 2013 on the basis that she was the spouse of the sponsor, Mr Ponnampalam Thirunesan, an Australian permanent resident. A secondary applicant Adsalini Thirunsen, who is now 12 years old, was also included. It is noted that the sponsor has indicated that he also has a two-year-old by his wife named Abisher.

18. According to the delegate it rejected the application on the basis that the applicant did not satisfy the criteria for the grant of these visas based on the contention that the applicant provided a false or misleading document in accordance with Public Interest Criterion (PIC) 4020.
19. According to the delegate this information was a non-genuine Sri Lankan police clearance certificate for the sponsor. According to the delegate in her response to the Department she claimed that the sponsor was unaware of the non-genuine nature of this police clearance certificate. The delegate did not consider this a plausible response and further contended that no other evidence was provided to demonstrate any willingness to obtain a police clearance certificate using conventional channels. In regard to the issue of compassionate and compelling circumstances that may affect the interests of an Australian citizen the delegate noted that separation from the sponsor may adversely affect the applicant and her daughter however the sponsor initially made the decision to arrive in Australia as an illegal maritime arrival with the understanding that there would be separation from his family for an undetermined period of time. The delegate did not consider the separation as a compelling or compassionate reason to waive the requirements of PIC 4020.
20. The Tribunal has considered the evidence provided at hearing from the applicant and the sponsor and nominated witnesses and has also considered all the material provided in the delegate's file and in the AAT file.
21. In particular, the Tribunal has considered a submission from the applicant's agent, Refugee Legal, dated 1 May 2020. In this submission it was noted that the sponsor is an Australian citizen who suffered persecution in Sri Lanka, that he is a refugee, and that he has now been separated from his family for more than 10 years except for four occasions in India and Malaysia lasting a month on each occasion.
22. The applicant's agent, in this document, stated that *"the sponsor and the applicant are unable to comment on the authenticity of the document, other than to say that they accept the evidence gathered by the Australian government from Sri Lanka police headquarters in Colombo indicating that the SLPC (Sri Lankan penal clearance certificate) was not issued by them."* The applicant's agent further stated that *"it is conceded that, on the available evidence to the department, the Minister may reasonably suspect that the penal clearance certificate is a bogus document. It is conceded that such information is relevant to criteria the Minister may consider when making the decision."*
23. The applicant's agent also stated that in regard to the waiver under PIC 4020, that there were compassionate and compelling circumstances that affect the interests of an Australian citizen due to the prolonged separation of the sponsor and his family leading to a deterioration of his mental health and possible suicide risk. It was also asserted that the sponsor was suffering mental ill-health with a lack of care in Australia.
24. The applicant's representative also provided a letter from Prof Patrick McGorry, a registered psychologist, dated 30 April 2020 stating that in his view the sponsor was suffering from mental ill-health as a result of events in the civil war in Sri Lanka, which has been exacerbated by the sponsor's separation from his family.
25. The applicant has also provided a statutory declaration dated 1 May 2020 outlining his point of view in regard to his persecution in his home country and his arrival in Australia, the circumstances of his police clearance, and his current circumstances. In this statement the sponsor has said that at the time he genuinely believed that his police clearance was a real one and that he made a mistake in trusting various parties back in his home country to procure such a document. He stated that he paid some extra money to obtain this certificate.

He also stated that he has been suffering from post-traumatic stress disorder since his experiences back in his home country.

26. In this declaration the sponsor noted that he met with his psychologist, Mr McGorry, regularly and that over the last two years he has grown close to him and that he has become a good friend and he has helped him a lot.
27. At hearing, the sponsor stated that he had been waiting in Australia for two years to get a police clearance certificate from Sri Lanka and had been unable to get one. On that basis he spoke to an associate of his who offered to provide such a certificate and in due course he received this certificate within a few weeks. He stated that he believed that it was genuine at the time. The Tribunal is concerned that neither the sponsor nor the applicant provided any evidence, that the Tribunal finds credible, that supports their statements that they actually believe the document was a genuine one and the Tribunal notes above the evidence provided by the applicant's representative via his submissions of 1 May 2020 and also orally at the hearing that it was recognised by the applicant that it was open to the department to find that the certificate provided was a bogus one in this case.
28. The Tribunal has considered this evidence and on the basis of the above finds that the applicant has provided a bogus document in this case and therefore had provided information that was false or misleading at the time it was given and that it was open to the Department to make a decision that a bogus document had been provided.
29. Therefore, the applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

30. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
31. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
32. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.
33. At the hearing, the applicant and the sponsor were asked by the Tribunal to state whether there were any compelling and compassionate circumstances that affected the interests of Australia or an Australian citizen that would warrant the waiver of PIC4020.
34. No evidence was provided by the parties in regard to any such circumstances insofar as it affected the interests of Australia however the sponsor and the applicant stated that there were such circumstances in regard to the interests of an Australian citizen, specifically, the sponsor himself.
35. At hearing, the sponsor stated that he had been suffering from severe depression and post-traumatic stress disorder as a result of his experiences back in his home country and also

exacerbated by leaving behind his wife and child, that he had another child now, and that he was missing them significantly.

36. The Tribunal discussed with the applicant and the sponsor evidence presented in regard to the submissions of the applicant's legal representative dated 1 May 2020, the statutory declaration of the sponsor dated 1 May 2020, statements and evidence provided by Prof Patrick McGorry, and other material. The Tribunal discussed with the applicant, the sponsor, and the sponsor's representative the evidence provided in regards to the mental health of the sponsor.
37. The Tribunal notes that evidence was provided that demonstrated that the sponsor was suffering mental health issues related to his circumstances back in Sri Lanka at the time he left and also exacerbated by separation from his family over the last 10 years. The Tribunal accepts that, based on the evidence provided, that the applicant has suffered mental health issues that may have been further affected by separation from his family. The Tribunal also notes however that the sponsor is here in Australia receiving in his submission significant mental health advice and support from professionals and has provided evidence that demonstrates that he is receiving the requisite care here in Australia for his mental health condition.
38. As such, while the sponsor has medical and psychological needs, the sponsor's own evidence is that those needs are being met. Further, the evidence is that notwithstanding the partial separation by distance, they continue to successfully maintain their claimed relationship including the extension of their family is a strong indication that the parties continue to navigate the emotional hardship of their temporary separation. In these circumstances the applicant has not satisfied the Tribunal that the requirements of PIC 4020 should be waived.
39. It follows therefore that, the Tribunal finds that the mental health condition of the sponsor as stated above does not in itself justify the waiver of PIC 4020 as the case for compelling or compassionate circumstances that affect the interests of an Australian citizen is not made out.
40. Given the above the requirements of PIC 4020 should not be waived.
41. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl.309.225.
42. In regard to the secondary applicant the Tribunal finds that she is not the member of a family unit who satisfies the primary criteria.

DECISION

43. The Tribunal affirms the decision not to grant the applicants Partner (Provisional) (Class UF) visas.

Stephen Witts
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is *false or misleading in a material particular* means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...